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Date: May 10, 2000
Case No.: 1998-LHC-1127
OWCP No.: 5-101166

In the Matter of

HILBERT HAYES
Claimant
v.

NEWPORT NEWS SHIPBUILDING
AND DRY DOCK COMPANY
Employer

DECISION AND ORDER

This proceeding involves a claim for temporary total disability from an injury alleged to have been suffered by Claimant, Hilbert Hayes, covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 948(a). (Hereinafter "the Act"). Claimant alleges that he was injured when he tripped over a welding cable and fell down in a poly bay while working for Employer; that as a result he suffered from a sprained ankle and injured knee; and that he continued working for Employer through extraordinary effort.

The claim was referred by the Director, Office of Workers' Compensation Programs to the Office of Administrative Law Judges for a formal hearing in accordance with the Act and the regulations issued thereunder. A formal hearing was held before the undersigned Administrative Law Judge on January 14, 1999. (TR.)[1] Employer submitted nine exhibits, EX 1 through EX 9, which were admitted without objection. (TR at 10.) Claimant submitted one exhibit, identified as CX 1, which was admitted without objection. (TR at 9.) The Employer's brief was filed on March 30, 1999 and the Claimant's brief was filed on April 2, 1999.

The findings and conclusions which follow are based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES

The issue disputed by the parties is whether Claimant is entitled to temporary total disability compensation from March 9, 1997 to June 23, 1997.

[1] EX - Employer's exhibit; CX- Claimant's exhibit; and TR - Transcript.

STIPULATIONS

At the hearing, Claimant and Employer stipulated that (TR at 5):

1. They are subject to the jurisdiction of the Act;

2. An employer/employee relationship existed at all relevant times;

3. The claimant sustained an injury arising out of and in the course of his employment on April 23, 1997;

4. Timely notice and claim for the injury were given and filed by the employee;

5. Timely notice and controversion were given and filed by the employer to the Department of Labor;

6. The claimant's average weekly wage at the time of the injury was $839.98 with a compensation rate of $559.99;

7. Medical services have been provided in accordance with Section 7 of the Act.

DISCUSSION OF LAW AND FACTS

A claimant seeking an award for total disability must prove that he is disabled by reason of his industrial injury from performing his regular employment. *Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP*, 592 F.2d 762, 765 (4th Cir. 1979) [hereinafter, *Chappell*]. After establishing such a disability, the Claimant is entitled to an award under the Act unless the employer alleges that he is substantially and gainfully employed. (*Id*.) Then the burden shifts to the employer, the proponent of a finding of less that total disability, to prove that alternative employment is available. (*Id*.)

In this case, the parties stipulated that the claimant sustained an injury arising out of and in the course of his employment on April 23, 1997. Based upon this stipulations and the supporting evidence, I find that the Claimant has suffered a work related injury during the course and scope of his employment by Employer, which is covered under the Act. As the Claimant has established that he has an injury as a result of his work related accident, he must now establish the extent (total or partial) of any resulting disability[2]. The Claimant has the burden of proving the extent of his disability without the benefit of the § 20 presumption. *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985); *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978).

[2] Neither party has requested permanent disability, therefore, the nature of the disability (temporary or permanent) is not an issue in this case and need not be discussed.

The extent of a claimant's disability refers to whether the disability is total or partial. The initial burden in fixing the extent of disability falls on the claimant, who must establish that his work-related injury precludes him from returning to his regular or usual employment. *Newport News Shipbuilding and Dry Dock Co., v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988); *Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199, 200 (4th Cir. 1984), *rev'g Tarner v. Trans-State Dredging*, 13 BRBS 53 (1980); *Chappell*, 592 F.2d at 765.

To establish that Claimant could not return to his regular employment, Claimant offered the medical evidence of Dr. Earl D. White, Claimant's treating physician. Dr. White stated that Claimant "[wa]s a heavy worker as a shipfitter. He need[ed] to be on limited duty status...until he completely recover[ed]..." (CX 1b.) In addition, Dr. White gave Claimant temporary restrictions on May 5, 1997, which included no climbing vertical ladders, crawling, kneeling or squatting. (EX 5a.) Claimant offers his own testimony to establish that his job installing machinery required climbing, crawling, kneeling, and squatting to get to the particular areas in which he needed to be. (TR at 12.)

Since Claimant was restricted from performing important aspects of the job and his treating physician put him on light duty, I find that Claimant has established that his work-related injury precluded him from returning to his regular or usual employment. Therefore, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.,* 19 BRBS 171 (1986).

The burden of proof, then, shifts to the employer to establish that suitable alternate employment was available. *Tann*, 841 F.2d at 542; *Trans-State Dredging*, 731 F.2d at 201; *Chappell*, 592 F.2d at 765. A job in the employer's facility may meet the employer's burden. *Spencer v. Baker Agricultural Co.*, 16 BRBS 203, 307; *Harrod v. Newport News Shipbuilding and Dry Dock*, 12 BRBS 10, 13-14 (1980.) In order to meet its burden by offering a job in its facility, employer must demonstrate the availability of light duty work which is necessary and which Claimant is capable of performing. *Kimmel v. Sun Shipbuilding and Dry Dock Co.*, 14 BRBS 412 (1981).

Employer in this case, has met its burden by showing that Claimant continued to work in its facility in the sub shop. The work was necessary, as evidenced by the testimony of Jeff Bolt, Claimant's supervisor, who stated that Claimant was working on a reactor shield. (Tr at 74.) Claimant's job was to get the shields and retainer bars in place on the reactor shield unit. (TR at 75.) Claimant testified that the shields and retainers were used to hold the insulation which shields the sub crew from the radiation of the nuclear reactor. (TR at 21.) Common sense dictates that this was a necessary job.

Employer also established that Claimant was capable of performing the job with the testimony of Mr. Bolt and the foreman's work orders. Mr. Bolt testified that Claimant took fewer breaks as time progressed, thus becoming more productive. (TR at 66-67.) Mr. Bolt also testified that there was never a problem when QID came to inspect a job Claimant had done. (Tr at 67.) If Claimant had indeed been unable to perform the job, then his performance would not have been characterized as productive and problems would have occurred with the inspection.

Claimant continued working full-time during the period in question. He was paid his regular wage, plus he was paid temporary partial disability to compensate for his lost overtime. (EX 7). Claimant has been fully compensated for the work he performed and has suffered no loss of wages.

However, the fact a claimant works after his or her injury does not necessarily preclude a finding of disability. *Walker v. Pacific Architects & Eng'rs*, 1 BRBS 145, 148 (1974); *Offshore Food Serv. v. Murillo*, 1 BRBS 9, 14 (1974). An award of compensation concurrent with continued employment traditionally can occur in two very limited situations.[3] The first is the "beneficent employer" situation where the claimant's post-injury employment is due solely to the beneficence of his or her employer. *See Walker, supra*.; *Profitt v. E.J. Bartells Co.*, 10 BRBS 433 (1979). The other situation is where the claimant continued his employment through "extraordinary effort," and in spite of excruciating pain and diminished strength. *Haughton Elevator Co v. Lewis*, 5 BRBS 62, aff'd 572 F.2d 447 (4th Cir. 1978); *See also, Jordan v. Bethlehem Steel Corp.*, 19 BRBS 82 (1986); *Richardson v. Safeway Stores*, 14 BRBS 855, 857-58 (1982).

Claimant contends that his employment was through extraordinary effort and in spite of excruciating pain and diminished strength. This is not supported by the record. First, Claimant argues that he was being worked outside of his restrictions while employed in the sub shop from May 9 until June 23, 1997. Claimant testified that his employment in the sub shop required him to squat and kneel everyday. (TR at 27.) This is inconsistent with Dr. White's office notes on June 2, 1997, which state that Claimant told Dr. White that he was doing shop work similar to his normal work, except he did not have to squat and kneel. (CX 1b, EX 8b.) Claimant's inconsistent accounts of his job requirements render his testimony questionable.

Claimant also argues that his employment in the sub shop caused his need for surgery. Claimant relies on his own testimony that he did not need surgery before he worked in the sub shop, while he did require surgery after his employment there. Claimant has offered no medical testimony to establish that it was his continued employment that caused the surgery to be necessary. The medical reports of Dr. White, the only physician's opinion in this case, stated that a Lachman's test, which had never been positive before, was positive on June 24, 1997. (CX 1a; EX 8a.) They also said that Dr. White felt that Claimant had a tear in his medial meniscus and that Claimant would need an athroscopy and partial medial meniscectomy in the near future. (*Id*.) Dr. White never offered an opinion as to what caused Claimant's medial meniscus to tear. Claimant's layman's opinion as to the reason he required surgery carries little weight. Therefore, I find that there is insufficient evidence to establish that Claimant's employment in the sub shop caused his need for surgery.

I do not doubt that Claimant was in pain while employed in the sub shop at Employer's facility. However, Claimant has not shown that his efforts to continue employment rose to the

[3] The Board has cautioned against broad application of these two exceptions, and has emphasized that circumstances which warrant an award of disability concurrent with a period when the claimant is working are the exception, not the rule. *Shoemaker v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 141, 145 (1980) *Chase v. Bethlehem Steel Corp*., 9 BRBS 143 (1978).

level of extraordinary effort or that he continued to work through excruciating pain and diminished strength. Claimant has been duly compensated for his employment during the period he worked in the sub shop and has been compensated for his loss of overtime while he was on light duty.

Claimant's request for temporary total disability is, therefore, DENIED.

RICHARD E. HUDDLESTON
Administrative Law Judge